Before the
FEDERAL COMMUNCIATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

COMMENTS OF ALCATEL USA, INC.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules,[1] Alcatel USA, Inc., ("Alcatel") hereby submits the following Comments to the above entitled proceeding.[2] Alcatel is a wholly-owned subsidiary of Alcatel S.A., a manufacturer of telecommunications and Internet equipment headquartered in France. In these Comments, Alcatel advocates the Commission's goal of creating regulatory parity among the various platforms used to provide broadband Internet access services, including but not limited to the telecommunications facilities of incumbent local exchange carriers ("ILECs") and the cable modem facilities of the cable television Multiple System Operators ("MSOs"). Regulatory parity between these platforms will spur the broadband access deployment necessary to increase innovation and place downward pressure on retail prices. In order to

[1] 47 CFR §§ 1.415, 1.419.

[2] Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, CC Docket No. 02-33, *Notice of Proposed Rulemaking* ("NPRM") (rel. Feb. 15, 2002).

achieve this parity, the Commission should exempt the ILECs' new broadband access facilities from its unbundling requirements and preempt these facilities and services from state regulation.

I. Alcatel Strongly Supports the Commission's Goal of Widespread Broadband Services Deployment.

The benefits of widespread, competitively priced broadband access have been well documented in a variety of proceedings before the Commission and other government agencies. Governments around the world have created national plans to prioritize broadband deployment and access by their citizenry, recognizing the widespread benefits such access will have on education, e-government, telecommuting, and electronic commerce.[3] A recent study of the economic benefits of such ubiquitous deployment in the United States was estimated to increase gross domestic product by $100-$500 billion per year.[4] FCC Chairman Michael Powell has noted that broadband has become the central communications policy objective in America[5] and that "the importance of broadband deployment to the public interest is too great to disregard any potential method of facilitating that deployment."[6]

Competition in broadband should be encouraged among distinct types of providers (CLEC v. ILEC), between delivery platforms (cable MSO, telco, satellite, fixed wireless),

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[3] *See*, Report of the National Broadband Task Force, *The New National Dream: Networking the Nation for Broadband Access*, (2001) http:/broadband.gc.ca/english/broadband.pdf. See also, Working Party on Telecommunications and Information Services Policies, *The Development of Broadband Access in OECD Countries*, The Organization for Economic Cooperation and Development, Oct. 29, 2001.

[4] *See* Robert W. Crandall and Charles L. Jackson, Criterion Economics LLC, *The $500 Billion Opportunity: Benefits of Widespread Diffusion of Broadband Internet Access*, (July 2001).

[5] Michael K. Powell, Chairman, Federal Communications Commission, *At The National Summit on Broadband Deployment*, Washington, DC (Oct. 25, 2001). <http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html>

[6] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("ILEC Broadband NPRM") (Separate Statement of Michael K. Powell).

and between content providers (access to multiple Internet service providers). Current regulation does not promote such vigorous competition, which invariably precludes the necessary market forces that would rapidly increase the availability of high-quality broadband services and place downward pressure on retail prices. Telecommunications carriers, particularly incumbent LECs, are at a competitive disadvantage in the market since they are subject to a number of onerous regulations that do not affect other broadband platform providers. Cable television, satellite, and fixed wireless providers are capable of delivering the broadband services to the user, but they are not subject to the same collocation, unbundling, and cost methodology burdens placed on incumbent local exchange carriers.

II. Parity in Regulations Among Various Platforms Will Spur Deployment.

Presently, unbundling, network sharing, and resale regulations disparately impact incumbent local exchange carriers when compared to the other widely recognized broadband platforms, such as cable television, fixed wireless, and satellite. While consumers may acquire the same broadband Internet services from any of these platforms,[7] it is only ILECs that are burdened with these heightened regulatory requirements. This disparity in regulatory obligation is not intentional; rather it is the result of legacy, platform-specific rules that were applicable before separate technologies began to converge and compete with each other in the same market.[8] In fact, the Commission has recently

[7] The Commission has recognized these distinct platforms are capable of delivering advanced telecommunications services. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket 98-146, FCC No. 02-33 (rel. Feb. 6, 2002) ("Third 706 Report") ¶16.

[8] The issue of whether the broadband market is separate and distinct from the dial up, local exchange, or exchange access markets is being addressed in a separate proceeding. *ILEC Broadband NPRM, supra* n. 6.

acknowledged that certain obligations of ILECs are based on the premise that they possess the exclusive, or at least primary, means for unaffiliated information service providers to access their customers,[9] whereas current data demonstrates that ILECs fail to possess even a plurality share in the broadband access market.[10]

The Commission must create a regulatory regime for broadband Internet services that is "platform-agnostic," which recognizes that broadband services are neither "telecommunications services"[11] or "cable services"[12] and that consumers have a similar expectation for these services, regardless of delivery platform. The present regulatory disparity can create false presumptions that one platform possesses greater capabilities or is favored by government regulators. Such presumptions can directly impact investment decisions by consumers and operators, which is evident by the investment reduction of the ILECs and corresponding increase by MSOs.[13]

In the Cable Modem Order the Commission concluded that cable modem service is an "information service"[14] and not a cable or telecommunications service.[15] Based on its traditional end-to-end analysis to determine jurisdiction, the Commission also concluded that broadband Internet services provided over cable modem architecture are interstate in

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[9] In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185; Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, ("Cable Modem Order & NPRM") (rel. Mar. 15, 2002), at ¶44.

[10] As of June 2001, there were 2,693,834 ADSL subscribers and 5,184,141 cable modem subscribers in the U.S., and the rate of growth over the most recent reporting period was 36% for the former and 45% for the latter. *Third 706 Report*, *supra* n. 7, at App. C, Table 1.

[11] 47 USC §153(46).

[12] *Id*., at §153(7).

[13] The ILECs have announced capital spending reductions in broadband due, in part, to the uncertain and onerous regulatory environment. *SBC Reports Third-Quarter Results* (Oct. 22, 2001), available at <http://www.sbc.com/press_room/1,5932,31,00.html?query=20011022-1>. Whereas the cable industry has invested more than $55 billion since 1996, including $14.29 billion in 2001 alone. *Cable & Telecommunications Industry Overview 2001*, NCTA, December 2001, ("Cable Industry Overview"). http://www.ncta.com.

[14] 47 USC §153(7).

[15] *Cable Modem Order & NPRM*, *supra* n. 9, at ¶33.

nature due to the predominate interstate and international path of Internet traffic.[16] The regulatory implications of the Commission's decisions are being considered and have been put out for comment in a notice of proposed rulemaking.[17] In this notice, the Commission specifically requests comments from interested parties on the issues of whether the decisions in that proceeding should be aligned or impact this proceeding and whether the Commission should focus on consistency between the two platforms.[18]

Alcatel strongly supports the Commission's decision to develop an analytical framework that is consistent across the widely-recognized broadband delivery platforms.[19] The conclusions in the Cable Modem Order that cable modem service is an interstate, information service that should be differentiated from the legacy cable regulations,[20] should be presumed in this proceeding to create regulatory parity across broadband platforms. Disparate regulatory treatment between competing platforms in the same market delivering like services will cause harm to both the platform subject to the heightened regulations as well as the market as whole.[21]

III. Broadband Internet Service Provided Over Telecommunications Facilities is Properly Classified as an Information Service Under the Act.

Alcatel agrees with the Commission's conclusion that wireline broadband Internet access services, whether provided over a third party's facilities or self-provided facilities, are information services subject to Title One of the Communications Act.[22] Congress purposefully created the telecommunications services and information services distinction

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[16] *Id.* at ¶59.
[17] *Cable Modem Order & NPRM*, *supra* n. 9.
[18] *NPRM, supra* n. 2.
[19] *Id.*, at ¶6.
[20] *Cable Modem Order & NPRM*, *supra* n. 9, at ¶33.
[21] *See*, Reply Comments of the Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, filed Sept. 29, 1990, at 26, ftnt. 42.

in the Act, and the Commission has made similar distinction between "basic" and "enhanced" services in the Computer proceedings.[23] Broadband Internet services provided via the ILECs' telecommunications infrastructure are not properly classified as telecommunications services and are clearly substitutional with the Broadband Internet services provided via the cable modem architecture.

IV. Information Services are Inherently Interstate Services and Regulatory Jurisdiction Should be Exclusively with the Commission.

Alcatel agrees with the Commission that the jurisdictional nature of the Internet access services examined in this proceeding should be held to be interstate communications and exclusively within the jurisdiction of the Commission. The Commission should preempt all state and local regulation of broadband access services over facilities controlled by the ILEC, since such regulation would conflict with the FCC's exclusive interstate jurisdiction and lead to uncertainty and confusion in the broadband market.

Sections 1 and 2(a) of the Communications Act[24]provide that the Commission shall have jurisdiction over all interstate and foreign communication that either originates or terminates in the United States, and the courts have held that Congress specifically intended to federally preempt the entire field of interstate regulation of communications.[25] The Commission has long used an end-to-end analysis in determining the jurisdictional nature of traffic and has rejected attempts to divide communications at any intermediate

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[22] *NPRM*, *supra* n. 2, at ¶16.
[23] *Id*.
[24] 47 USC §§ 151, 152(a). *See Also, Id.* §152(b) (excluding the FCC from jurisdiction matters relating to intrastate communications service by wire or radio).
[25] *See Sprint Corp. v. Evans*, 818 F.Supp. 1447 (1993).

point of switching or exchange between carriers.[26] For example, in determining the proper jurisdiction for access charge rates, regulators rely on a percentage of interstate usage ("PIU") to determine whether the interexchange carrier's obligation to the local exchange access carrier should be based on the interstate rate regulated by the Commission or the intrastate rate sanctioned by the state public utility commission.[27] PIUs are determined by call origination and termination, and intervening switching or re-origination, such as with a calling card platform, are disregarded in this analysis. Likewise, the Commission has employed an end-to-end traffic analysis in the international market to determine whether it has jurisdiction over traffic that has been transited,[28] and in order to determine the maximum settlement rate for the traffic.[29] Again, intervening switching or third country hubbing has traditionally been disregarded when determining traffic routes.

In the case of Internet traffic, specific Commission precedence also exists to justify concluding that it is interstate traffic, thus wireline broadband service should be within the exclusive jurisdiction of the Commission.[30] In the Commission's recent order concerning broadband Internet access services provided via cable modem architecture, the Commission cites the *Inter-carrier Compensation Order for ISP-Bound Traffic* [31] Order

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[26] *See* GTE Tel. Operating Cos., *Memorandum Opinion and Order*, 13 FCC Rcd 22,466 (1998) ("GTE ADSL") ¶17; *See Also* Thomas W. Bonnett, *Is ISP-Bound Traffic Local or Interstate*?, 53 Fed. Comm L.J.239, 272-275 (2001).

[27] PIU calculations are discussed in *In re Bell South Telecommunications, Inc., Revisions to Tariff FCC No. 1*, 8 FCC Rcd 1403, 1403 n.1 (1993).

[28] Traditionally, the Commission has not exerted jurisdiction over traffic that transits, but does not originate or terminate in the United States. *See* 47 USC §153(17) (The term "foreign communications" or "foreign transmission" means communications or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States).

[29] *See In re* International Settlement Rates, *Report and Order*, 12 FCC Rcd. 19,806 (1997); *In re* International Settlement Rates, *Report and Order on Reconsideration and Order Lifting Stay*, 14 FCC Rcd. 9256 (1999).

[30] *See Generally*, Jason Oxman, *The FCC and the Unregulation of the Internet* (Office of Plans and Policy FCC, Working Paper No. 31, 1999), at <http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.txt>.

[31] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on*

and the 1998 decision concerning the proper tariffing jurisdiction of GTE's ADSL[32] service to support its conclusion that Internet information services are interstate. The broadband Internet services provided over the cable modem and telecommunications infrastructure are indistinguishable and any conclusions concerning one platform should be applicable to the other, thus these services provided over the ILECs' infrastructure should be considered interstate.

V. The Commission Should Remove Network Unbundling Obligations for New Broadband Facilities and Create an ISP Access Regime That is Consistent Across Platforms.

In the interest of regulatory parity among varying platforms capable of providing broadband Internet access services, the Commission should seek to remove some of the network unbundling obligations placed on ILECs. When the Commission examined enhanced services access in the Computer proceedings it mandated open access and resale because the telephone network was the primary, if not exclusive, means for enhanced service providers to access customers.[33] The market for customer access by information service providers has changed dramatically since the Computer proceedings as inter-modal competition has provided several competing platforms for customers to access these services. The Commission's rules should be adjusted accordingly to recognize this effectively competitive environment, particularly if it decides to change the ILECs provision of broadband access services to nondominant.[34]

Remand and Report and Order ("Intercarrier Compensation Order") FCC 01-131 ¶52 (rel. Apr. 27, 2001), available at 2001 WL 455869, *petition for review pending*, WorldCom, Inc. v. FCC, D.C. Circuit Nos. 01-1218 *et al*.

[32] *See GTE ADSL*, *supra* n. 26.

[33] *Cable Modem Order & NPRM,* supra n. 9*,* at ¶44.

[34] *ILEC Broadband NPRM*, *supra* n. 6.

By recognizing that broadband Internet access services provided over telecommunications facilities are properly categorized as "information services" under the Act, the Commission should exempt ILEC facilities deployed for broadband services from Section 251 unbundling requirements and preempt any state regulation requiring these facilities be unbundled. First, the obligation for ILECs to unbundle their networks for requesting "telecommunications carriers"[35] is limited to "network elements" as defined under the Act. In Section 3(29) of the Communications Act, the definition of "network element" means "…a facility or equipment used in the provision of a telecommunications service."[36] Consistency dictates that since the Commission concluded that broadband Internet access services are "information services" and that information services and telecommunications services are mutually exclusive,[37] then no obligation exists under Section 251 for the ILECs to provide requesting entities with access to network elements if such entities are not "telecommunications carriers" and the facilities are used for services other than "telecommunications services." Second, a conclusion that broadband Internet services are interstate information services would preempt state rules seeking to impose such requirements based on Sections 1 and 2(a) of the Act, and such a determination would satisfy the inconsistency standard under Section 251(d)(3)(B). Third, relief from these unbundling obligations would be in the Public Interest by promoting regulatory parity with cable modem services since MSOs providing these services have no unbundling or network sharing obligation.

In particular, the new broadband facilities, including fiber and DSL electronics on the customer side of the central office, that are necessary to deliver these information

[35] 47 USC §153(43) ("The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services…").

services should be exempt from the Commission's unbundling rules. These are the new or upgraded facilities that are critical to increasing the availability and capabilities of broadband services. Investment in these facilities has stagnated recently since the ILECs are hesitant to make such capital expenditures if their competitors will have access at TELRIC rates that the incumbents state are below real cost.[38] At the same time, MSOs have invested steadily and substantially in their network architecture to upgrade existing cable television facilities making them capable of delivering broadband access services via cable modem.[39] Deployment will not accelerate and the benefits of increased competition between these platforms will not be realized while regulatory disparity remains an investment consideration.

Finally, the Commission should consider an access regime for unaffiliated ISPs[40] that is consistent with ISP access rights to cable modem transmission facilities and that relies more on market forces rather than obligatory access with public disclosure of rates, terms, and conditions. Presently, ISPs have entitled access to the transmission facilities of the ILECs, but they lack access rights to the transmission facilities of the MSOs. Such disparity must be reconciled in this proceeding and the Cable Modem proceeding in order to create the platform agnostic broadband environment that the Commission is seeking.

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[36] *Id*., at §153(29).
[37] *Universal Service Report to Congress*, 13 FCC Rcd 11,501, 11520.
[38] TELRIC is the pricing methodology used by the FCC that is currently being challenged before the U.S. Supreme Court. The Supreme Court will decide, *inter alia*, whether TELRIC is an illegal taking that violates the 5th Amendment to the U.S. Constitution. See *Verizon Communications, Inc. v. Federal Communications Commission*, Nos. 00-501, 00-555, 00-587, 00-509, and 00-602.
[39] *See Cable Industry Overview*, supra n. 13.
[40] *NPRM*, *supra* n. 2, at ¶50.

V. Conclusion

Alcatel strongly urges the Commission to reconcile the regulatory disparity that currently exists between the ILECs and the MSOs in their provisioning of broadband Internet access services. The Commission is correct that broadband services are properly classified as interstate, information services within the exclusive jurisdiction of the Commission. Based on this conclusion, the Commission should confirm that the facilities used to provide these services do not fall within the Section 251 obligations, which are reserved for requesting "telecommunications carriers," and state regulation is preempted. Such facilities include new and upgraded fiber and DSL electronics on the customer side of the central office.

Respectfully Submitted,

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